Supreme Court, U.S.
FILED
FEB 3 2003
OFFICE OF THE CLERK

No. 02-914

(2)

In The
Supreme Court of the United States

CITY OF MAYFIELD HEIGHTS, MAYOR MARGARET A. EGENSPERGER, et al.,

Petitioners,

v.

MICHAEL A. SHEMO, Trustee, and LARRY GOLDBERG, Trustee,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SHELDON BERNS, ESQ.
Counsel of Record
BENJAMIN J. OCKNER, ESQ.
JORDAN BERNS, ESQ.
BERNS, OCKNER & GREENBERGER, LLC
24500 Chagrin Blvd., Suite 101
Beachwood, Ohio 44122
Telephone: 216-831-8838
Facsimile: 216-464-4489

STEVEN S. ROSENTHAL, ESQ.
ALAN PALMER, ESQ.
KAYE SCHOLER LLP
901 Fifteenth Street, N.W.
Washington, DC 20005-2327
Telephone: 202-682-3500
Facsimile: 202-682-3580
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	13
I. The Judgment Below Was Not "Final" Within The Meaning Of 28 U.S.C. § 1257	13
II. The Decision Below Rests On Independent And Adequate State Law Grounds	16
III. The "Questions Presented" In The Petition Were Not Timely And Properly Raised Below And The Petition Fails To Comply With Rule 14(g)(i) Of This Court	21
IV. The Ohio Supreme Court Correctly Applied This Court's Takings Decisions, And This Case Would Be An Inappropriate Vehicle For Reconsidering Those Decisions	23
a. This Ohio Supreme Court Correctly Applied *Agins* And The Takings Decisions Of This Court	23
b. This Is An Inappropriate Case In Which To Reconsider *Agins*	25
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Agins v. Tiburon, 447 U.S. 255 (1980) ..... *passim*

Andrus v. Allard, 444 U.S. 51 (1979) 18

California v. Freeman, 488 U.S. 1311 (1989) 16

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1990) 23, 25

Coleman v. Thompson, 501 U.S. 722 (1991) 20

Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 17

Dolan v. City of Tigard, 512 U.S. 374 (1994) 25

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304 (1987) 19

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 17

Gerijo, Inc. v. Fairfield, 70 Ohio St. 3d 223, 638 N.E.2d 533 (1994) 4, 5, 6, 19

Glenn v. Bartlett, 98 F.3d 721 (2d Cir. 1996) 20

Goldberg Companies, Inc. v. Richmond Heights City Council, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998) 5, 18, 19

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 24

Grays Harbor Logging Co. v. Coats-Fordney Logging Co., 243 U.S. 251 (1917) 13, 14

Herb v. Pitcairn, 324 U.S. 117 (1945) 16, 20

Huddleston v. Dwyer, 322 U.S. 232 (1944) 16

TABLE OF AUTHORITIES – Continued

Page

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) 17, 19

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 9, 25

Michigan v. Long, 463 U.S. 1032 (1983) 20

Mugler v. Kansas, 123 U.S. 623 (1887) 24

Murdock v. City of Memphis, 20 Wall. 590 (1875) 16

Nectow v. Cambridge, 277 U.S. 183 (1928) 21, 24

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 25

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973) 15

Norwood v. Sheen, 126 Ohio St. 482, 186 N.E. 102 (1933) 10, 19

O'Brien v. Skinner, 414 U.S. 524 (1974) 16

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 11, 12, 13, 19

Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) ..... *passim*

Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62 (1948) 15

San Diego Gas & Electric v. City of San Diego, 450 U.S. 621 (1981) 14, 22

Shemo v. Mayfield Heights, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000) ..... *passim*

Smith v. Erie Railroad Co., 134 Ohio St. 135, 16 N.E.2d 310 (1938) 18

TABLE OF AUTHORITIES – Continued

Page

State ex rel. BSW Development Group v. Dayton, 83 Ohio St. 3d 338, 699 N.E.2d 1271 (1998), *cert. denied*, 526 U.S. 1067 (1999) 9, 18, 19

State ex rel. Elsass v. Shelby County Board Of Commissioners, 92 Ohio St. 3d 529, 751 N.E.2d 1032 (2001)..... 9

State ex rel. OTR v. City Of Columbus, 76 Ohio St. 3d 203, 667 N.E.2d 8 (1996).....18

State ex rel. Shemo v. City of Mayfield Heights, 95 Ohio St. 3d 59, 765 N.E.2d 345, *reconsideration granted in part*, 96 Ohio St. 3d 379, 775 N.E.2d 493 (2002).....*passim*

State ex rel. Shemo v. Mayfield Heights, 92 Ohio St. 3d 324, 750 N.E.2d 167 (2001)..... 8

State ex rel. Shemo v. Mayfield Heights, 93 Ohio St. 3d 1, 752 N.E.2d 854 (2001)..... 8

State ex rel. Shemo v. Mayfield Heights, 96 Ohio St. 3d 379, 775 N.E.2d 493 (2002)..... 1

Superior Uptown, Inc. v. Cleveland, 39 Ohio St. 2d 36, 313 N.E.2d 820 (1974).....11

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002).....12, 13, 25, 29

Union Oil v. City of Worthington, 62 Ohio St. 2d 263, 405 N.E.2d 277 (1980).....4, 5

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).....9, 25

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).....24

TABLE OF AUTHORITIES – Continued

Page

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 24

Yee v. City of Escondido, 503 U.S. 519 (1992) 22, 23

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V ..... *passim*

U.S. Const. Amend. XIV 9, 15, 16

Ohio Const. Art. I, § 19 ..... 16, 18, 19

STATUTES

28 U.S.C. § 1257 ..... 15, 22

28 U.S.C. § 1257(a) 13

Ohio Rev. Code § 2744.03(A) 11

RULES

U.S. Supreme Court Rule 14(g)(i) 21

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Michael A. Shemo, Trustee, and Larry Goldberg, Trustee (collectively, "Trustees") respectfully urge this Court to deny the Petition for a Writ of Certiorari ("Petition" or "Pet.") of Petitioners City of Mayfield Heights, Ohio, *et al.* (collectively, "City") seeking review of the Ohio Supreme Court's decision in *State ex rel. Shemo v. City of Mayfield Heights*, 95 Ohio St. 3d 59, 765 N.E.2d 345, *reconsideration granted in part*, 96 Ohio St. 3d 379, 775 N.E.2d 493 (2002).

COUNTER-STATEMENT OF THE CASE

The City describes this dispute as a challenge to an "errant" or "obsolete" zoning regulation in effect for more than 70 years, and describes the City's conduct as "inaction" resulting in "normal delays in obtaining building permits, changes in zoning ordinance, variances, and the like." Pet. at 10, 16, 18. Nothing could be further from the truth. The zoning classification that was held unconstitutional as applied to the Trustees' property was one to which the City, over the Trustees' objection, rezoned that property on December 11, 1995. For three years beginning in March 1992, the City defended the constitutionality of the "70 year old" U-1(1) detached single-family ordinance before stipulating its invalidity on December 11, 1995. On that same day, the City rezoned the property to U-2-A, allowing only detached and attached single-family use. The City defended the constitutionality of the application of that classification to the Trustee's property until April 21, 2000, when the Ohio Supreme Court denied the City's request to reconsider its unanimous February 9, 2000 decision affirming the Cuyahoga County Common Pleas Court's holding that, as applied to the property, the ordinance was arbitrary, capricious and unreasonable, and failed to substantially advance any legitimate governmental interests of the City. Thereafter, the City not only refused to comply with the trial court's order (thus requiring the

Trustees to seek a writ of mandamus from the Ohio Supreme Court compelling the City to comply with that order), but actively engaged in conduct to stop the development of the Trustees' property in accordance with that order, prompting two members of the Ohio Supreme Court *sua sponte* to suggest that the court also award attorneys fees against the City. Such conduct was not inaction nor was the almost ten year period during which the City trampled the constitutional rights of the Trustees a "normal delay in obtaining a building permit."

The subject property (the "Property")[1] is an irregular triangular shaped 22.6 acre parcel of land owned by the Trustees located near the intersection of Interstate 271 and Mayfield Road in the City of Mayfield Heights. To the south, the Property is bordered by several retail and commercial properties including a big box appliance store, a motel, and a restaurant. To the northeast, it is bordered by Interstate 271, a ten-lane interstate highway with daily traffic exceeding 92,000 vehicles. The Property is at grade with the highway, and is degraded by the noise and pollution from the traffic it carries. In addition, high-intensity lighting on the highway floods the Property with so much light that it is possible to read a newspaper at 10:30 p.m. while standing in the middle of the Property without any other light source.[2] Additionally, six massive electric transmission towers carrying high tension power lines are located on the northeastern edge of the Property. The transmission towers, power lines and high intensity lighting from the adjacent highway run the entire 2,000 foot length of the Property's northeastern border. On March 19, 1992, the Trustees filed suit against the City in

---

[1] The facts regarding the Property are described in *Shemo v. Mayfield Heights*, 88 Ohio St. 3d 7, 722 N.E.2d 1018 (2000) ("*Shemo I*"), Petition Appendix – "App." – 34-45, at App. 40-43.

[2] Trial testimony of Roger D. Ritley in *Shemo I*, Transcript at 1004-1005.

the trial court seeking a declaratory judgment that the U-1(1) detached single-family use classification was unconstitutional as applied to the Property. The Trustees initially sought to develop the Property for multi-family residential use. App. 1. They dismissed that suit on June 28, 1995 after determining that the Property was not suitable for habitation.[3] The Trustees then refiled suit seeking a declaratory judgment that the U-1(1) detached single-family use classification was unconstitutional as applied to the Property, and a determination that a specific retail use the Trustees proposed for the Property was reasonable. App. 1.[4]

On December 11, 1995, having defended its constitutionality as applied to the Property for more than three years, the City then stipulated that the U-1(1) detached single-family use classification was invalid as applied to the Property and agreed to rezone the Property to a constitutional use classification. Incredibly, on that same day, the City rezoned the Property, over the Trustees' objections, to *another* form of single-family use classification, U-2-A, allowing only detached and attached single-family homes. App. 2.

The Trustees challenged the constitutionality of the new single-family use classification as applied to the Property. A trial was conducted over a ten day period in March and April 1996, during which the trial court heard evidence as to the constitutionality of the U-2-A use classification as applied to the Property, and the reasonableness of the Trustees' proposed retail use as shown in the Site Plan. The City defended the constitutionality of the U-2-A zoning classification as applied to the Property by

---

[3] Trial testimony of Michael A. Shemo in *Shemo I*, Transcript at 176-178.

[4] The retail use was the subject of a site plan dated April 22, 1995 (the "Site Plan").

introducing testimony of a planner the City engaged to defend the single-family zoning ordinance in court. The planner, conceding that he knew of no other land that was burdened by the same degrading characteristics of the Property, App. 42, testified that the Property was suitable for childless, old couples who had no desire to be outdoors, and who would keep their windows shut to block the noise and light from the adjoining interstate highway. App. 43.[5]

By an Opinion and Judgment Entry dated May 16, 1996, App. 67-79, the trial court found, *inter alia*, that the Property was not "suitable for habitation", App. 73, and held that the U-2-A classification was unconstitutional as applied to the Property. App. 78. Consistent with the test articulated in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E.2d 533 (1994), the trial court held that the Trustees had established beyond fair debate that those regulations failed to substantially advance the City's legitimate health, safety or welfare concerns and denied the Trustees of the economic feasible use of the Property. App. 78.[6] The trial court properly rejected the incredulous testimony of the City's planner.

The trial court made no determination as to the reasonableness of the Trustees' proposed retail use; instead, pursuant to *Union Oil v. City of Worthington*, 62 Ohio St. 2d 263, 405 N.E.2d 277 (1980),[7] the trial court

---

[5] The testimony of the City's planner is included in the Supplement filed by the Trustees with the Ohio Supreme Court in *Shemo I*.

[6] *Gerijo* held that a zoning ordinance was not unconstitutional as applied to property unless the owner demonstrated beyond fair debate that the ordinance failed to substantially advance legitimate state interests *and* deprived the owner of the economic viable use of the property.

[7] *Union Oil* established the procedure under Ohio law to be followed by trial courts in reviewing the constitutionality of specific zoning classifications when applied to property.

advised the City "that it may rezone the Property within 90 days" of the order. App. 78.

The City then filed a notice of appeal to the Cuyahoga County Court of Appeals. By a Journal Entry dated April 3, 1997, App. 62-64, the Court of Appeals remanded the case to the trial court to rule on the reasonableness of the Trustees' proposed retail use pursuant to *Union Oil*. On September 2, 1997, the trial court entered its Final Judgment Entry (the "Trial Court's Judgment"), App. 65-66, ruling that Trustees' proposed retail use was reasonable, ordering the City to take any and all actions to facilitate, and not interfere with, improvements to be made to a street servicing the Property, enjoining the City and members of its Council from interfering with the proposed retail use of the Property and the installation of the requisite street improvements, and ordering the City to issue all approvals and permits to allow the retail development of the Property consistent with that Judgment.

On September 25, 1997, the City appealed the Trial Court's Judgment to the Court of Appeals. While that appeal was pending, the Ohio Supreme Court announced its decision in *Goldberg Companies, Inc. v. Richmond Heights City Council*, 81 Ohio St. 3d 207, 690 N.E.2d 510 (1998), modifying the standard in Ohio for determining the constitutionality of a zoning ordinance as applied to property. Despite the fact that the test articulated in *Gerijo* and applied by the trial court was much more stringent than the one set forth in *Goldberg*, on August 20, 1998, the Court of Appeals vacated the Trial Court's Judgment and remanded the case for reconsideration in accordance with *Goldberg*. App. 56-61.[8]

---

[8] Both *Gerijo* and *Goldberg* involve a determination as to whether a zoning ordinance substantially advances legitimate state interests. *Goldberg*, however, did away with the requirement in *Gerijo* that the ordinance must also deprive the owner of the economic viable use of property. The trial court found that the Trustees proved both elements

(Continued on following page)

The Trustees appealed that decision to the Ohio Supreme Court. On February 9, 2000, the Ohio Supreme Court announced its decision in *Shemo I*, unanimously reversing the decision of the Court of Appeals and affirming and reinstating the Trial Court's Judgment. The Ohio Supreme Court found "that the trial court's conclusion that the property is uninhabitable is supported by competent, credible evidence," that the Trustees "have shown that the city lacks any legitimate governmental health, safety, and welfare concerns in support of the U-2-A zoning classification," and that "the trial court was warranted in holding that the proposed U-4 commercial classification is not detrimental to the health, safety, and welfare concerns of the City and is a reasonable classification of the property." *Shemo I*, 88 Ohio St. 3d at 13, 722 N.E.2d at 1024, App. 44-45.

A motion for reconsideration filed by the City on February 17, 2000 was unanimously denied by the Ohio Supreme Court on April 21, 2000. *Shemo v. Mayfield Heights*, 88 Ohio St. 3d 1489, 727 N.E.2d 596 (2000).

Vowing to continue its fight against the Trustees' retail development of the Property,[9] in April 2000 the City claimed frivolously and for the first time an ownership interest in a portion of the Property that had been dedicated to the City in 1927 for the construction of streets (creating so-called "paper streets"), and threatened to sell

---

of *Gerijo*; therefore, it was unnecessary for the Court of Appeals to remand the case.

[9] During a public meeting held on February 14, 2000, five days after the Ohio Supreme Court decided *Shemo I*, the City's law director advised the City's Council and Mayor and audience: "And I also believe we have other legal recourse and again, the Mayor and this Council, has [sic] been very supportive of all you folks in this particular fight, and they continue to be supportive and as those issues unfold, I can tell you, I don't believe the legal fight is over." Evidence of Relators filed in Case No. 01-1325 on October 16, 2001 ("Rel. Evid."), Exhibit A.

those "paper streets."[10] It was clear that the City had abandoned such interest more than 40 years earlier by accepting the dedication of a subdivision to the west of the Property, thereby blocking access to the paper streets and rendering the Property landlocked. *State ex rel. Shemo v. Mayfield Heights*, 95 Ohio St. 3d 59, 68, 765 N.E.2d 345, 354-355 (2002) ("*Shemo IV*"), App. 15-17. Nevertheless, the Trustees were compelled to file an action for declaratory and injunctive relief to block the City from trying to sell the "paper streets" and to declare that the City had abandoned them. In order to avoid further delays in the development of the Property, eight months later, on December 29, 2000, the Trustees and the City entered into a stipulated judgment entry by which the City formally vacated the paper streets. Rel. Evid., Ex. B.

On March 2, 2001, the Trustees filed with the City's Planning Commission their application for preliminary approval of road improvement plans for the retail development of the Property. Despite its having been clearly affirmed and reinstated by the Ohio Supreme Court, the City refused to comply with the Trial Court's Judgment and continued to block the Trustees' judicially approved retail use, now disingenuously claiming that in *Shemo I*, the Ohio Supreme Court had determined that access to and from the *only public street* providing access to the Property, Maplewood Road (one of only two necessary points of access to the Property, the other being a driveway

[10] The City's description of the Property as "vacant, undeveloped land platted as a single-family residential subdivision", Pet. at 17, is misleading. The paper streets were included in a platted single-family residential subdivision that included only half of the Property, not all of it. Relators' Compendium of Exhibits filed in Case No. 01-1325 on July 23, 2001 ("Rel. Comp."), Exhibit K-3. Part of the same subdivision immediately south of the Property had been rezoned by the City for retail use. Trial testimony of Michael A. Shemo in *Shemo I*, Transcript at 139.

easement through private property) was confined to emergency use.[11]

On May 16, 2001, the Trustees filed a Complaint for a Writ of Mandamus in the Ohio Supreme Court seeking to compel the City, its Mayor and the members of its Council to approve the Trustees' road improvement plans and to grant all other permits and approvals necessary for the retail development of the Property in accordance with the Trial Court's Judgment as affirmed and reinstated by the Ohio Supreme Court. The Trustees' Complaint included a second claim for relief – the issuance of a writ of mandamus compelling the City to institute proceedings in the Cuyahoga County Probate Court to determine the extent, if any, to which the value of the Trustees' use of the Property was diminished as a consequence of the City's continuing unconstitutional application of its single-family zoning regulations to the Property.[12]

On August 8, 2001, the Ohio Supreme Court unanimously entered a peremptory writ of mandamus as to the first of the Trustees' two claims, ordering the City to approve the Trustees' road improvement plans as provided for in the Trial Court's Judgment and to grant all other permits and approvals necessary for the retail development of the Property in accordance with the Trial Court's Judgment. *State ex rel. Shemo v. Mayfield Heights*, 93 Ohio St. 3d 1, 752 N.E.2d 854 (2001) ("*Shemo III*"), App. 20-29.

---

[11] Rel. Evid., Ex. B, which also contains a detailed description of other attempts by the City to block the development of the Property.

[12] The Trustees' Complaint was dismissed without prejudice as a consequence of a technical defect in their compliance with the Ohio Supreme Court's Rules of Practice, *State ex rel. Shemo v. Mayfield Heights*, 92 Ohio St. 3d 324, 750 N.E.2d 167 (2001) ("*Shemo II*"), App. 30-33, and the Trustees immediately refiled their Complaint for a Writ of Mandamus on July 23, 2001.

On April 10, 2002, after the Trustees' second claim was fully briefed and evidence submitted in accordance with the Ohio Supreme Court's Rules of Practice, that Court unanimously issued a writ compelling the City "to commence appropriation proceedings to determine the amount of the City's temporary taking of relator's property." *Shemo IV*, 95 Ohio St. 3d at 70, 765 N.E.2d at 355-356, App. 19. The Ohio Supreme Court held that the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Ohio Constitution "guarantee that private property shall not be taken for public use without just compensation," and noted that under Ohio law "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." 95 Ohio St. 3d at 63, 765 N.E.2d at 350, App. 7, *citing State ex rel. Elsass v. Shelby County Board Of Commissioners*, 92 Ohio St. 3d 529, 751 N.E.2d 1032 (2001).

The Ohio Supreme Court then determined that the Trustees had established a compensable taking under both the United States and Ohio Constitutions, citing this Court's decisions in *Agins v. Tiburon*, 447 U.S. 255 (1980), *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), as well as its own prior decision in *Goldberg* in which it adopted the disjunctive two-part test for a regulatory taking set forth in *Agins*.[13] 95 Ohio St. 3d at 63, 765 N.E.2d at 350, App. 8. Citing *State ex rel. BSW Development Group v. Dayton*, 83 Ohio St. 3d 338, 699 N.E.2d 1271 (1998), *cert. denied*, 526 U.S. 1067 (1999), the Ohio Supreme Court held that either of the two prongs

[13] "[A]pplication of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land." 447 U.S. at 260.

of the test establishes a taking. 95 Ohio St. 3d at 64, 765 N.E.2d at 351, App. 8-9. The Ohio Supreme Court held:

> It is evident that relators have satisfied the first prong, *i.e.*, the application of the U-1(1) and U-2-A zoning classifications to their property was unconstitutional in that the application of these classifications did not substantially advance legitimate state interests. The parties stipulated that the U-1(1) zoning classification as applied to relators' property was unconstitutional, and the common pleas court found, in the declaratory judgment reinstated by this court in *Shemo I*, that the U-2-A zoning classification was also unconstitutional because, as applied to relators' property, it did not substantially advance any legitimate health, safety, or welfare concern of Mayfield Heights.
>
> * * *
>
> The U-1(1) and U-2-A single-family residential zoning classifications were unconstitutionally applied to relators' property, and the property was, in fact, not suitable for this residential use. Therefore, relators have proved a taking of their property.

95 Ohio St. 3d at 64-65, 765 N.E.2d at 351-352, App. 9-11.

With respect to the measure of damages, the Ohio Supreme Court, relying on *Norwood v. Sheen*, 126 Ohio St. 482, 186 N.E. 102 (1933), held "relators are entitled to the diminution in the value of the use of their property during the period of the temporary taking." 95 Ohio St. 3d at 69, 765 N.E.2d at 355, App. 18-19. The Ohio Supreme Court determined that the period of the temporary taking commenced when the single-family residential zoning regulations were applied to the Property on March 19, 1992, the date the Trustees filed their initial lawsuit against the City, and ended in April 2001, when the Property was rezoned to allow retail use of the Property

and the City's unconstitutional zoning regulations were no longer applied to the Property. *Id.*

The Ohio Supreme Court thus fashioned a remedy under the Ohio Constitution to compensate the Trustees to the extent that the value of their use of the Property was diminished by application of zoning regulations that was arbitrary, capricious and unreasonable, and failed to substantially advance legitimate governmental interests.

On April 22, 2002, the City asked the Ohio Supreme Court to reconsider its decision in *Shemo IV*. The City advanced three reasons for reconsideration. First, it argued that *Shemo IV* overruled *sub silentio Superior Uptown, Inc. v. Cleveland*, 39 Ohio St. 2d 36, 313 N.E.2d 820 (1974), in which the Ohio Supreme Court held that a direct cause of action for money damages cannot be maintained against a municipality as a result of the adoption of an invalid zoning ordinance. The Ohio Supreme Court rejected this argument because the claim asserted by the Trustees was not a direct cause of action for damages. *State ex rel. Shemo v. Mayfield Heights*, 96 Ohio St. 3d 379, 380, 775 N.E.2d 493, 495 (2002) ("*Shemo V*"), App. 48.[14]

Next, the City complained that the Ohio Supreme Court had failed in its takings analysis to apply the *ad hoc* factual inquiry set forth in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Expressing doubts as to the applicability of "the *Penn Cent./Palazzolo* analysis," 96 Ohio St. 3d at 381, 775 N.E.2d at 496, App. 50, the Ohio Supreme Court nevertheless responded to the City's complaint and concluded that reconsideration was not warranted:

---

[14] Ohio does not permit a direct action for damages against a municipality for a regulatory taking. *Superior Uptown*, 39 Ohio St. 2d at 40, 313 N.E.2d at 823; Ohio Rev. Code § 2744.03(A)(1) and (3).

> Even assuming that the *Penn Cent./Palazzolo* analysis applies, a finding of a compensable taking is still warranted. Restricting relators' land to residential use on property that was held to be unsuitable for residential use had an obvious adverse economic impact on relators, which necessarily interfered with their reasonable investment-backed expectations when they requested that the property be rezoned for retail development. Further, the city's application of residential classifications to their property did not substantially advance any legitimate health, safety, or welfare concern of Mayfield Heights. *Shemo*, 95 Ohio St.3d at 64, 765 N.E.2d 345. . . . In addition, the duration of the challenged restrictions was much lengthier here than the challenged restrictions in *Tahoe-Sierra* [*Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002)], which totaled 32 months, . . . 122 S.Ct. at 1489, . . . ("the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim").

95 Ohio St. 3d at 381-382, 765 N.E.2d at 496, App. 50-51.

Finally, the City asked the Ohio Supreme Court to reconsider the length of the period for the compensable taking. After review, the Ohio Supreme Court shortened the period of the temporary taking by establishing a starting date in June 1995, when the Trustees refiled their action challenging the constitutionality of the U-1(1) classification as applied to their Property and seeking approval of a retail use on their Property, as opposed to March 19, 1992, when the Trustees first commenced their challenge to the constitutionality of the application of the U-1(1) classification to the Property. App. 53. The Court rejected the City's argument that the period of the taking

should be further shortened because of procedural delays in the rezoning of the Property. App. 54.

In *Shemo V*, the court *sua sponte* considered this Court's decision in *Tahoe-Sierra*,[15] noting that it involved a claim under the second prong of the regulatory takings test set forth in *Agins*, and reiterating its conclusion that "application of the *Penn Cent./Palazzolo* ad hoc factual inquiry here does not, as previously discussed, require a different holding." 95 Ohio St. 3d at 382, 765 N.E.2d at 497, App. 52.

REASONS FOR DENYING THE WRIT

I. The Judgment Below Was Not "Final" Within The Meaning Of 28 U.S.C. § 1257.

This Court's jurisdiction to review decisions of a state's highest court by writ of certiorari extends only to review of "final judgments or decrees." 28 U.S.C. § 1257(a). Under this Court's longstanding precedent, a judgment in a Takings case is not "final", and therefore is not subject to review by this Court, until a determination of just compensation has been made. *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917). In the case *sub judice*, after determining that the Trustees had established a compensable taking of their Property, the Ohio Supreme Court granted the Trustees' request for a writ of mandamus to compel the City to commence appropriation proceedings for the determination of the Trustees' damages, if any, for the City's taking of the use of their Property. App. at 19. The compensation proceedings are to be commenced in the Cuyahoga County Common Pleas Court, Probate Division. Because there has not yet been a determination of just compensation, under *Grays* and its

[15] This Court's decision in *Tahoe-Sierra* was not announced until after the City asked the Ohio Supreme Court to reconsider its decision in *Shemo IV*.

progeny this Court has no jurisdiction to review the decision of the Ohio Supreme Court.

In *Grays*, a case with a procedural history strikingly similar to that of this case, plaintiffs opposed a condemnation procedure involving construction of a railroad on their property, alleging that the proposed construction constituted a taking of their property without due process of law in violation of the Washington Constitution. A lower court entered an order of condemnation and set proceedings to determine the damages and compensation. Before the issue of just compensation was decided, plaintiffs applied for and obtained a writ of certiorari from the state supreme court to review the constitutional question. The Washington Supreme Court affirmed the judgment of the lower court and remanded the case to that court for further proceedings. In assessing its jurisdiction to review the state court's decision, this Court considered the finality of the state court judgment and announced the now well-settled rule applicable to takings claims:

> [W]e cannot regard a condemnation proceeding taken under the authority of the Constitution of Washington and the Act of 1913 as severable into two distinct branches. The Constitution forbids that the property be taken without compensation first made or ascertained and paid into court for the owner, and, of course, in case of controversy, compensation cannot be made to the owner until the amount of it has been ascertained. It follows that the judgment entered by the superior court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid.

243 U.S. at 256.

Hence the Court concluded that it was without jurisdiction to review the state court decision. This holding has been reaffirmed in subsequent cases, most recently in *San Diego Gas & Electric v. City of San Diego*, 450 U.S.

621 (1981). There, the plaintiff alleged that the city's rezoning of its property deprived it of the beneficial use of its property and, therefore, constituted a taking without just compensation in violation of the Federal and State Constitutions. This Court was presented with a situation that was the reverse of the typical takings question – the state court had determined that monetary compensation was not an appropriate remedy, but had not decided whether any taking had occurred, and thus remanded the case to the lower court for further proceedings. This Court considered whether it had jurisdiction to review the decision under 28 U.S.C. § 1257. Relying on *Grays*, this Court stated as follows: "[A] state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not 'final.'" 450 U.S. at 632-33. Based on this principle, the Court found that there was no final decision and dismissed the appeal for want of jurisdiction.

The Court should similarly dismiss the City's Petition. *See also North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 163 (1973) ("[I]n [eminent domain] cases the federal constitutional question embraces not only a taking but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem."); *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62, 68 (1948) ("[A] decision that a taking by eminent domain is for public use, where the amount of compensation has not been determined, is not deemed final, certainly where the property will not change hands until after the award of compensation.").

It is indisputable that Petitioners have the burden of affirmatively establishing this Court's jurisdiction. *See Republic Natural Gas Co.*, 334 U.S. at 70. The City has

preemptively and prematurely filed its Petition before a determination of just compensation has been made. Given this Court's clear and unambiguous rule that takings proceedings are not final judgments subject to review until compensation has been determined, the Court should deny the City's Petition.

II. The Decision Below Rests On Independent And Adequate State Law Grounds.

This Court has long respected interpretations of state law by a state's highest court to be conclusive and binding on it. *See, e.g., Murdock v. City of Memphis*, 20 Wall. 590 (1875); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *California v. Freeman*, 488 U.S. 1311, 1313 (1989).

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge *federal* rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945) (emphasis added).

The Trustees' claims were asserted and addressed by the Ohio Supreme Court under both Article I, Section 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution. In adopting a remedy to compensate the Trustees to the extent the value of their use of the Property was diminished by the City's application of single-family zoning classifications that was arbitrary, capricious, and unreasonable, and failed to substantially advance legitimate governmental interests,

it is clear that the decision of the Ohio Supreme Court is independently grounded upon state constitutional law principles.[16]

It is "'the settled rule that where the judgment of a state court rests upon two grounds, one of which is Federal and the other non-federal in character, [this Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.'" *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965) (*quoting Cramp v. Board of Public Instruction*, 368 U.S. 278, 281 (1961), *in turn quoting Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)).

This case is strikingly similar to *Jankovich*. In *Jankovich*, the Indiana Supreme Court held that the City of Gary's airport zoning ordinance "purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation." 379 U.S. at 489, *quoting* 244 Ind. 574, 584, 193 N.E. 2d 237, 242 (1965). Upon review, however, this Court observed that the state court decision addressed "the just compensation requirement of the Indiana Constitution . . . as well as . . . the Fourteenth Amendment." 379 U.S. at 491. Noting that the state court opinion "quite understandably" cited both state and federal decisions, this Court concluded that "even though [the] opinion relie[d] on similar provisions in both the Federal and State Constitutions," the state constitutional provision was "an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." *Id.* at 492. Similarly, while the court below discussed the Trustees' takings claims in the context of both federal and state law, it is clear that those claims

---

[16] The City has not suggested and cannot show that the Ohio Supreme Court's determination of the Trustees' takings claim under the Ohio Constitution somehow trenches on any rights secured by the Federal Constitution.

were resolved on independent and adequate state constitutional grounds, as set forth in previous Ohio decisions.

The existence of an independent and adequate state-law basis for the Ohio Supreme Court's decision is evident from the text of *Shemo IV*. The court began its analysis by noting that it was addressing both "[t]he United States and the Ohio Constitutions," each of which "guarantee[s] that private property should not be taken for public use without just compensation." App. 7 (emphasis added). And the court specifically cited in this regard Section 19, Article I, of the Ohio Constitution, which provides that "[p]rivate property shall ever be held inviolate" and that if property is taken by the State, "compensation shall be made to the owner. . . ." *Id.*

In assessing whether a taking had occurred, the Ohio Supreme Court noted the *Agins* test and then added that in *Goldberg* and *BSW* it had "also adopted" the same test. App. 8.[17] Since the Ohio Supreme Court was bound in its resolution of the Trustees' federal takings claim by this

[17] In *BSW*, the court relied on *State ex rel. OTR v. City Of Columbus*, 76 Ohio St. 3d 203, 667 N.E.2d 8 (1996), in which it held: "In order to establish a taking, a landowner must demonstrate a substantial or unreasonable interference with a property right. . . . Such an interference may involve the actual physical taking of real property, or it may include the deprivation of an intangible interest in the premises." 76 Ohio St. 3d at 206-207, 667 N.E.2d at 11-12. *OTR* in turn relied upon *Smith v. Erie Railroad Co.*, 134 Ohio St. 135, 16 N.E.2d 310 (1938), Syllabus, Para. 1, which states: "Under Section 19, Article I of the [Ohio] Constitution, which requires compensation to be made for private property taken for public use, *any taking, whether it be physical or merely deprives the owner of an intangible interest appurtenant to the premises*, entitles the owner to compensation." (Emphasis added.) These decisions reveal that Ohio's property jurisprudence is in marked contrast to decisions of this Court like *Andrus v. Allard*, 444 U.S. 51 (1979), in which this Court held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." 444 U.S. at 65-66.

Court's interpretation of the United States Constitution, and has no discretion to "adopt" or not "adopt" such an interpretation, its announced "adoption" of the *Agins* test can only mean that in construing the Ohio Constitution, the court independently determined that it would "also" follow the approach outline in *Agins*.

Indeed, in elaborating on its conclusion that "[t]his test is disjunctive," the court cited no less than seven state court decisions – *Gerijo, Goldberg,* and *BSW* in the text and four others in a footnote, App. 8-9 – as providing the basis for that conclusion. "[U]nderstandably," as in *Jankovich*, the court also referred to decisions of this Court. Its only references to any such decisions other than *Agins*, however, were to *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987) (which it found persuasive on the issue of the Trustees' entitlement to compensation for a temporary taking – consistent with that court's earlier decision in *Norwood* – despite the fact that *First English* arose under the second prong of *Agins*), and to a statement in *Palazzolo* that a taking may occur even where "a regulation places limitations on land that fall short of eliminating all economically beneficial use. . . . " App. 9. *Palazzolo* did not purport to apply the first prong of *Agins*, however, which is the subject of the "Questions Presented" by the Petition. Hence, *Palazzolo* could not possibly be a part of the *basis* for the ruling of the Ohio Supreme Court challenged in the City's Petition.

Finally, with respect to the measure of compensation, the Ohio Supreme Court relied on state law as set forth in *Norwood*, Syllabus, Para. 4, cited at App. 18-19, in which that court held that the measure of compensation under Article I, Section 19 of the Ohio Constitution for a temporary taking is the "diminution in the value of the use of the property during [the relevant] period."

Since deciding *Jankovich*, this Court's approach to discerning the existence of adequate and independent state grounds has evolved, most notably in the review of

state court decisions in criminal cases. Observing that state courts "handle the vast bulk of all criminal litigation in this country" and "necessarily create a considerable body of 'federal law' in the process," in *Michigan v. Long*, 463 U.S. 1032, 1042, n.8 (1983), the Court explained that it had "become more interested in the application and development of federal law by state courts in the light of the recent significant expansion of federally created standards that we have imposed on the States." *Id.* 13. The Court held that where the adequacy and independence of a state-law ground is "not clear from the face of the [state court's] opinion," it would presume and "accept as the most reasonable explanation that the court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1041.

Even under this approach, however, the absence of an explicit statement, in so many words, that "we are deciding this case on state-law grounds" is not a *sine qua non* for determining that a separate state-law basis for a decision exists. *E.g., Coleman v. Thompson*, 501 U.S. 722, 739 (1991) ("we will not impose on state courts the responsibility for using particular language"); *Glenn v. Bartlett*, 98 F.3d 721, 725 (2d Cir. 1996) ("to require a state court to use specific talismanic phrases when ruling in the alternative would be undue formalism; it would also intrude on the state court's autonomy without advancing the federalism and comity interests protected by the independent and adequate state grounds doctrine"). The real question is always whether it "fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law," since "[t]he [*Long*] presumption applies *only*" in such circumstances. *Coleman*, 501 U.S. at 739 (emphasis added). This is necessarily true, since the independent and adequate state-law doctrine is based on "the limitations of [this Court's] own jurisdiction." *Herb v. Pitcairn*, 324 U.S. at 125.

It is obvious from the text of *Shemo IV* that the Ohio Supreme Court *chose* to "adopt" the two-part *Agins* test in

resolving the takings issue under the Ohio Constitution. That the Ohio Supreme Court may have regarded some decisions of this Court as persuasive as to the proper construction of the Ohio Constitution does not change the fact that the holding was based on adequate and independent state-law grounds under that Constitution.

III. The "Questions Presented" In The Petition Were Not Timely And Properly Raised Below And The Petition Fails To Comply With Rule 14(g)(i) Of This Court.

Rule 14(g)(i) of this Court requires that a party seeking review of a state court judgment set forth with specificity in its petition: (1) each stage in the proceedings when the federal questions sought to be reviewed were raised; (2) the "method or manner of raising them and way in which they were passed on" by the state courts; and (3) "pertinent quotations of the record . . . so as to show the federal question was timely and properly raised." Except for a brief passage from its Motion for Reconsideration before the Ohio Supreme Court, the City has failed to comply with the Rule, which is intended to permit Petitioner to demonstrate that this Court has jurisdiction. The City's failure to comply with Rule 14(g)(i) is amply explained by the fact that the City, as demonstrated below, has in fact failed to timely and properly raise the federal questions that it is seeking to bring before this Court.

The City is asking this Court to overrule a line of authority that long precedes this case, which holds that "application of general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interest . . . ." *Agins*, 447 U.S. at 260; *see also Nectow v. Cambridge,* 277 U.S. 183 (1928). However, the City's principal argument in the original action for mandamus was far narrower and fact-specific in

nature[18], and its only discussion of *Agins* in the proceedings below was to observe that this Court did not find a taking under the facts in *Agins*. The City never challenged this Court's reasoning or analysis in *Agins* or the test it set forth. Similarly, the City never discussed Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co.*, in the proceedings below. The one brief occasion on which the City claims, Pet. at 9, to have raised before the Ohio Supreme Court the issues which it presents in its Petition, upon examination, does not in fact do that. Moreover, the quoted language was presented in support of a contention that was addressed to how the Ohio Supreme Court should interpret Ohio law, not as to how it should interpret the U.S. Constitution.[19]

In *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992), this Court stated: "In reviewing the judgments of state courts under the jurisdictional grant of *28 U. S. C. § 1257,* the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."

---

[18] "Proposition of Law No. I: When A Zoning Ordinance Restricting The Use Of Property To Residential Use Is Declared Unconstitutional There Is No Involuntary Taking Of Property Without Just Compensation Where: (A) At The Time The Property Owner Acquired Ownership Of The Land Its Zoning Was Limited To Residential Use; (B) There Was No Deprivation Of The Right To Continue The Prior Use Of The Property; and (C) The Property Owner Failed To Establish Any Harm Caused By The Government Between The Time It Became The Owner Of The Property And The Time The Zoning Ordinance Was Declared Unconstitutional." Brief of Respondents in Case No. 01-1325 filed November 12, 2001, at i, 5.

[19] "This Court should reconsider its enlargement of Ohio law to include the right to devote property to the use for which it should be zoned as compensable under the Takings Clause". Respondent's Motion for Reconsideration in Case No. 01-1325 filed April 22, 2002, at 3.

Yee's cautionary instruction applies here. As the City never suggested that the Ohio Supreme Court's consideration of *Agins* in connection with the Trustees' takings claim was erroneous, that Court had no reason to engage in such analysis. Under similar circumstances, this Court declined to review *Agins* in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1990):

> [W]e note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability. . . . *The city did not challenge below the applicability or continued viability of the general test for regulatory takings liability recited by these authorities and upon which the jury instructions appear to have been modeled. Given the posture of the case before us, we decline the suggestions of amici to revisit these precedents.*

526 U.S. at 704 (emphasis added) (citations omitted).

Having failed to demonstrate that it timely and properly raised below the issues it seeks to raise here, the City's Petition should be denied.

IV. The Ohio Supreme Court Correctly Applied This Court's Takings Decisions, And This Case Would Be An Inappropriate Vehicle For Reconsidering Those Decisions.

a. This Ohio Supreme Court Correctly Applied *Agins* And The Takings Decisions Of This Court.

If this Court reaches the issues presented by the Petition, it bears emphasis that the City has not contended that the Ohio Supreme Court has done other than to adopt and faithfully apply *Agins* and this Court's Takings Clause jurisprudence. *Agins* set forth the following test: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner of economically viable use of his land." 447 U.S. at 260.

This test, and specifically its first prong, was hardly novel and had antecedents back to the earliest zoning cases heard by this Court. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court upheld the constitutionality of a comprehensive zoning scheme, but cautioned that such ordinances "must find their justification in some aspect of the police power, asserted for the public welfare." 272 U.S. at 387.

Nectow v. Cambridge, decided two years later, confirmed that the power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is "not unlimited": "[O]ther questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, convenience and general welfare." 277 U.S. at 188. Where a zoning regulation does not bear a substantial relation to a community's public health, safety, convenience and welfare as applied to property, the "invasion of property" occasioned by that application is "serious and highly injurious." *Id.*

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), this Court reiterated what it had observed 75 years earlier: "A prohibition simply upon the use of property for purposes that are declared, *by valid legislation*, to be injurious to the health, morals or safety of the community cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." 369 U.S. at 593 (emphasis added), *quoting Mugler v. Kansas*, 123 U.S. 623, 668 (1887). *Goldblatt* implicitly recognized that *invalid legislation* imposing limitations on the use of property can affect a taking of property.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), decided roughly contemporaneously with *Agins*, this Court held that in the absence of any police power justification or any reasonable basis for sustaining it, a Florida statute directing payment to the county of interest accruing on interpleader funds deposited in county court registries, when a fee, prescribed by another

statute, was charged for the clerk's services in receiving the fund into the registry, violated the Takings Clause of the Fifth Amendment. That clause, the Court explained, "stands as a shield against the arbitrary use of governmental power." 449 U.S. at 164.

Since deciding *Agins*, this Court has reiterated the *Agins* test on numerous occasions. *See, e.g., Riverside Bayview Homes, Inc.*, 474 U.S. at 126; *Keystone Bituminous Coal Assn.*, 480 U.S. at 485; *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In *Del Monte Dunes*, this Court expressly declined to reconsider *Agins*. 526 U.S. at 704. In *Tahoe-Sierra*, this Court once again reiterated the *Agins* test. Despite holding that temporary moratoria on development imposed during the development of a comprehensive land-use plan for the Lake Tahoe area did not constitute a *per se* taking of property, the Court explained that the landowners could have attempted to establish a taking on the theory "that the moratoria did not substantially advance a legitimate state interest, see *Agins* and *Monterey*." *Tahoe-Sierra*, 122 S. Ct. at 1485.

In light of this history, the Ohio Supreme Court acted entirely appropriately in applying the *Agins* test as the appropriate legal standard for finding a taking under the U.S. Constitution. Since it is undisputed that application of the City's zoning ordinance to the Property did not substantially advance legitimate state interests, the Ohio Supreme Court's issuance of a writ compelling the City to commence appropriation proceedings to determine the compensation due the Trustees as a result of the City's temporary taking of their property is unobjectionable under this Court's precedents.

b. This Is An Inappropriate Case In Which To Reconsider *Agins*.

By ignoring its own misconduct and distorting the factual and procedural background of this case, the City

seeks to depict this case as one presenting issues "critical to local government throughout the country." Pet. at 21. Contrary to the City's suggestion, "local government[s] throughout the country" are not guilty of the misconduct committed by the City in this case. Because the Ohio Supreme Court's decision results from the unique facts of this case, this is not an appropriate case for reconsideration of *Agins*.

In its effort to portray this case as presenting a wrong worthy of this Court's consideration, the City audaciously claims that the Trustees suffered no economic harm on account of the City's unconstitutional interference with the Trustees' use of the Property, are "likely being rewarded far beyond their reasonable expectations", Pet. at 17, and, in fact, have "reaped a substantial reward", Pet. at 18, on account of the City's rezoning the Property after being ordered to do so by the courts. Not surprisingly, there is no factual or logical support for the City's claim or the City's argument that any increase in value of the Property occasioned by the rezoning in April 2001 compensates the Trustees for the diminution in the value of their use of the Property while it was unconstitutionally zoned by the City for single-family use.[20] According to the City, no economic consequences flowed from its arbitrary and capricious application of zoning regulations that prevented the Trustees from using their Property. For that proposition to be true, it would also have to be true that, had the Property been zoned for a constitutionally permitted use during the almost six-year period for which the court determined the Trustees were entitled to compensation, the Trustees

[20] Initially, the Trustees claimed that the period of the taking should begin in March 1992, and the court below agreed. On reconsideration, the court revised the starting date to June 1995 when the Trustees first sought to develop their Property for retail use. In both *Shemo IV* and *Shemo V*, the court below held that the taking period ended in April 2001, when the Property was rezoned to commercial use.

would have elected not to develop the Property, would have borne the expenses of maintaining the Property, and would have received no income from it.

It may be that obtaining rights to which one is entitled under the U.S. and Ohio Constitutions is a windfall in the City of Mayfield Heights; hopefully, that proposition is not true in the rest of the United States.

Of course the City is correct in stating that the Property increased in value once it was rezoned to a retail use as a consequence of the court orders to do so. Before then, however, "*the value of the use of their property*," *Shemo IV*, App. 18, was *diminished* by the City's arbitrary and capricious action – not inaction.

The City sought to convince the Ohio Supreme Court that it would be unfair to award compensation to the Trustees under the facts of this case and that a decision awarding compensation would "have an extreme chilling effect on a municipality's exercise of their [sic] constitutional police power with respect to land use." Brief of Respondents, filed November 12, 2001, at 10. The Ohio Supreme Court unanimously determined that the City's conduct in this case warranted a finding that a taking had occurred for which compensation was due the Trustees.

As the Ohio Supreme Court observed in *Shemo IV*, a city may stay an adverse "judgment without posting bond pending its resolution on appeal." App. 28. Thus, in Ohio a city knows that even if a challenge as to the constitutionality of a zoning regulation is decided against it at the trial court level, it has the right to appeal that decision, together with any order containing injunctive relief, without posting a supersedeas bond and may thereby postpone for years any adverse final determination. In this case, the City postponed compliance with the adverse determination of the trial court for more than five years.

Cities in Ohio understand that they have the ability to delay an owner's use of his or her property for years by enforcing unconstitutional zoning regulations and by defending that enforcement over the course of years of litigation. In the absence of a compensation remedy, some

cities will use that advantage, without regard to injury they may inflict on property owners, to extract clearly unlawful concessions as to the use of their property, or to curry favor with some residents by refusing to make unpopular but constitutionally-mandated decisions, forcing the courts to make unpopular decisions which the cities, themselves, should have made. In either event, property owners may and generally will be deprived of their constitutional rights for years.[21]

Here, the City refused to make the constitutionally-mandated decision to allow the Trustees a reasonable use of their property, foisted the obligation to make that decision on the courts, and, when the courts made the decision that the City was obliged to make, blamed the courts for the City's failure. In a re-election campaign flyer circulated by the City's mayor to residents of the City during the week of April 22, 2001, she stated:

> FACT None of us want this development; not the residents, not Council, not I. The city has expended a great deal of money fighting this case. Many of us have spent long hours in court to represent the interests of our community. Remember that the Ohio Supreme Court Justices, not the City of Mayfield Heights or any of its representatives, made this decision. The Supreme Court Justices hold the sole blame for this fiasco.

Compendium of Exhibits filed on behalf of Relators in Case No. 01-1325 on July 23, 2001, Exhibit J.

The Ohio Supreme Court found that the City's conduct constituted a taking for which a claim in inverse condemnation was available. To have done otherwise would have left cities in Ohio unaccountable and property owners without a remedy under Ohio law. That, of course, is

---

[21] While the life of land may be infinite, the economic opportunities for its use and development are not. Those opportunities are governed by economic and market factors that are dynamic and fleeting.

exactly what the City would prefer – no accountability for its conduct and no remedy for the Trustees under Ohio law, thus leaving the Trustees alone to bear the burden of the City's unlawful conduct. Faced with the facts in this case, the Ohio Supreme Court determined that the Trustees were entitled to compensation and fashioned a remedy under Ohio law that the court deemed appropriate. Those facts do not warrant reconsideration of *Agins* in this case.

The City also contends that this case "squarely presents the issue of whether a zoning regulation which does not substantially advance a legitimate public purpose is *per se* violative of the Takings Clause of the Fifth Amendment to the United States Constitution . . .," Pet. at 2-3; *i.e.*, that a deprivation of property arising from the failure of a zoning ordinance to substantially advance legitimate governmental interests is not a categorical taking, and must be subjected to the analysis in *Penn Central*. Although the Ohio Supreme Court expressed its view that under the facts of this case a determination that a taking had occurred did not require application of the *Penn Central* analysis, that court, in response to both the City's request and this Court's decision in *Tahoe-Sierra*, *did* apply the *Penn Central* factors and *still* concluded that the City had taken the Property. App. 50-52.

Given the egregious conduct of the City and the fact that the Ohio Supreme Court actually applied the *Penn Central* factors and, upon application of those factors, still found a taking, this clearly is not an appropriate case in which to determine whether or not the City's conduct constitutes a categorical taking.

CONCLUSION

The City has petitioned this Court to interpret the Takings Clause of the Fifth Amendment to the United States Constitution as preventing the Ohio Supreme Court from fashioning a remedy under the Ohio Constitution to compensate property owners against whose property a city

has arbitrarily and capriciously enforced a zoning ordinance that fails to substantially advance legitimate governmental interests as to such property. In doing so, the City has misstated the factual and procedural background of this dispute, disregarded the absence of finality of the judgment below, failed to raise in the court below the issues it asks this Court to consider, and misstated the issues presented by this case by ignoring the Ohio Supreme Court's application of the *Penn Central* analysis on reconsideration. For the reasons set forth herein, the City's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SHELDON BERNS, ESQ.
Counsel of Record
BENJAMIN J. OCKNER, ESQ.
JORDAN BERNS, ESQ.
BERNS, OCKNER &
GREENBERGER, LLC
24500 Chagrin Blvd., Suite 101
Beachwood, Ohio 44122
Telephone: 216-831-8838
Facsimile: 216-464-4489

STEVEN S. ROSENTHAL, ESQ.
ALAN PALMER, ESQ.
KAYE SCHOLER LLP
901 Fifteenth Street, N.W.
Washington, DC 20005-2327
Telephone: 202-682-3500
Facsimile: 202-682-3580